THE DISPOSITION OF UNLAWFUL ACCUMULATIONS IN NEW YORK.—One of the most difficult and still unsettled problems in the New York law of trusts is that dealing with the distribution of unlawful accumulations, which under Artlcle III, Section 63 of the Real Property Law pass "to the persons presumptively entitled to the next eventual estate."[1] The cases representing divergent views may be grouped and a typical case of each group studied.

Perhaps the last word by an appellate court in New York on the first group of cases is that of *Matter of Megrue*.[2] The facts were that T established a trust of corporation stock for the benefit of A, his widow, with remainder over to X. T directed that if a stock dividend be declared, it should be added to the trust estate. Such a dividend was declared and both A and X claim it; X claiming that the stock dividend is income and an unlawful accumulation and that he is the taker of the next eventual estate; A basing his claim on the fact that the stock dividend is not income and, therefore, not an unlawful accumulation; and that even if it is an unlawful accumulation A is the next eventual taker of it. The court held that so much of the stock as was represented by surplus which had accrued before T's death was capital, not income, and could lawfully be added to the corpus of the trust; but that which had accrued since T's death was income[3] and could not be lawfully accumulated. The accumulation was given to A and not to X, the unlawful direction being stricken out of the will.[4] The importance of the decision of this case lies in the fact that it reached the same result as was reached in cases upon which the court rests the decision; but ignores the reasoning of those cases.[5] They give to the *cestui* the unlawful accumulation because they consider the *cestui* the next eventual taker; but the court in this case, in speaking of the claim of the next eventual taker, says,[6] "Such a disposition, however, is to be made only when the will contains no other direction as to the disposition of income." Thus it is clear that the court in this case did not attempt to apply the statute at all, because it believed that the statute should not apply to cases where there was unlawful direction to accumulate, but only to cases where there was no direction to accumulate at all except such as could be implied.[7]

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[1]This section of the Real Property Law applies to accumulations of income from real property as well as from personal property. Matter of Herteau (1908) 125 App. Div. 110, 110 N. Y. Supp. 59.

[2](1915) 170 App. Div. 653, 157 N. Y. Supp. 565; *aff'd* (1916) 217 N. Y. 623, 111 N. E. 1091.

[3]Matter of Osborne (1913) 209 N. Y. 450, 103 N. E. 823.

[4]It is interesting to note the effect of Eisner *v.* Macomber (March 8, 1920) 40 Sup. Ct. 189, which held that stock dividends are capital and not income, if followed in New York. The result would be that all accumulations of stock dividends would be lawful.

[5]The court in Matter of Megrue rested its decision upon Pray *v.* Hegeman (1883) 92 N. Y. 508 and Baker *v.* DeForrest (1884) 95 N. Y. 13. It is the last of a series of cases beginning with Lang *v.* Ropke (N. Y. 1852) 5 Sandf. Super. Ct. 363 and followed by the later cases of Schettler *v.* Smith (1869) 41 N. Y. 328 and Manice *v.* Manice (1871) 43 N. Y. 303.

[6](1915) 170 App. Div. 653, at p. 657.

[7]This erroneous idea that the statute did not apply where there was an invalid direction as to the disposition of accumulations, but only to cases where there was an absence of direction, had its basis in Central Trust Co. *v.* Egleston (1905) 47 Misc. 475, 95 N. Y. Supp. 945. The case was

There is little in favor of the cases in the first group. No one can say that the result reached carries out the intention of the creator of the trust; because to give to the *cestui* the whole income when by the terms of the trust he is to have only a portion of it, defeats intentions. Nor can it be said that the statute provides for such a distribution. While it is true that the statute is vague in its meaning, it is fair to say that it was never intended so to operate.

The last word on the second group of cases decided by an appellate court is *Cochrane* v. *Schell*.[8] This case is typical of the group in its facts.[9] T by will created a trust for the life of A, with the remainder over to A's children. A was given only a portion of the trust income so that an unlawful accumulation arose. The court held that the children were entitled to the accumulation under the statute because they had vested remainders and they were the ones who presumptively would take the corpus of the trust estate at the termination of the trust. Throughout this group of cases the accumulations are disposed of in the same way, namely, to those who hold the remainder and therefore will take the trust corpus when the trust ceases.

The principle of this group of cases seems very sound. Intentions are effectuated more nearly than in the first group because the very ones whom the testator had taken the income from, *i. e.*, the *cestuis*, are not given the accumulations. The principle of this group of cases seems to effectuate a rational interpretation of the statute. It is everywhere recognized that the income must be distributed as it accrues even though it may pass into the hands of those who may, by reason of subsequent events, never take the corpus of the trust.

The case of *St. John v. Andrews Institute*[10] stands alone. The deceased by will bequeathed a fund to the Andrews Institute, a projected but not yet existant corporation with the stipulation that if the gift were invalid the Smithsonian Institution should take. As the Andrews Institute was not incorporated for a year, a year's income from the bequest accumulated which three parties claimed, (1) the next of kin, (2) the Andrews Institute and (3) the Smithsonian Institution. The last two based their claims upon the fact that they are the presumptive takers of the next eventual estate. The court in dealing with the claim of the Andrews Institute recognized the principle uniformly adhered to in the second group of cases, *i. e.*, that the accumulations should go to the next eventual taker of the corpus. This would have compelled the court to give the accumulation to the Andrews

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reversed on other grounds (1906) 185 N. Y. 23, 77 N. E. 989. Undoubtedly, Surrogate Fowler's criticism of the case in *In re* Kohler (1916) 96 Misc. 433, at pp. 452, 453, 160 N. Y. Supp. 669 is correct. The statute contains the words "When . . . *no valid direction* for their accumulation is given," and obviously the statute covers two sorts of cases, first, where there is an invalid direction, second where there is no direction at all.

[8](1894) 140 N. Y. 516, 35 N. E. 945.

[9]Probably the first case of this group is Kilpatrick *v.* Johnson (1857) 15 N. Y. 322, followed by Gilman *v.* Reddington (1861) 24 N. Y. 9; Huxtum *v.* Carse (N. Y. 1864) 2 Barb. 506; Matter of Deyermand (1881) 24 Hun, 1; Cook *v.* Lowry (1884) 95 N. Y. 103; Crossman *v.* Crossman (1889) 113 N. Y. 503, 21 N. E. 180; Matter of Snyder (1901) 35 Misc. 588, 72 N. Y. Supp. 61; Cochrane *v.* Alexandre (1907) 56 Misc. 212, 107 N. Y. Supp 587; Treadwell *v.* Treadwell (1914) 86 Misc. 104, 148 N. Y. Supp. 391.

[10](1908) 191 N. Y. 254, 83 N. E. 981.

Institute; but this would be inconsistent with well settled law.[11] Concerning the claim of the Smithsonian Institution the court said that as a gift to the Andrews Institute was valid the event in which the former institution was to take never occurred and hence the Smithsonian Institution was not the next eventual taker. The court took the only other possibility open and disposed of the accumulation to the next of kin. As the next of kin were the *cestuis* of a resulting trust the decision seems correct.

Another case which stands alone and which merits a careful study is *United States Trust Company* v. *Soher*.[12] T established a trust for the life of his two sons A and B with the stipulation that one half of the accumulation of income together with one half of the corpus of the trust on the death of either A or B should go to his children or issue; or on the death of either without children or issue the surviving brother should take. When the case arose for the construction of the will, neither A or B had children or issue. The court held that Section 63 of the Real Property Law had no application to this case, as the next eventual takers were not in being. The court refused to apply the statute because it recognized that if A should have a child he would take the accumulation on A's share and A would get the accumulation on B's share so long as B had no children. This the court thought would defeat intention; but it ignored the fact that the object of the statute is to defeat intention and to make the creation of trust conform to legislative standards. The court held the next of kin would take the accumulation. The decision, so far as it is based on authority, seems to rest upon the unintelligible case of *Phelps Ex.* v. *Pond*.[13]

Little can be said of the *Soher* case. The reasoning of the case is unsound and out of harmony with the second group of cases to which it justly belongs. It is clear that while A and B had no children, each had a vested remainder in the other's share and, hence, as events then stood each was a presumptive taker in the other's estate. B's remainder was subject to be divested by the birth of issue to A and A's by the birth of issue to B. Section 40, Article III of the Real Property Law defines a remainder as vested when there is a person in being ready to step in on the termination of the precedent estate. The statute has abrogated the common law as can be seen in the line of cases beginning with *Moore* v. *Littel*.[14] *Archer's Case*[15] and *Luddington* v. *Kime*[16] are no longer law in New York and, therefore, the remainders to the children or issue being contingent did not make the remainders to A and B contingent.

In the recent case of *In re Kohler*,[17] if the construction of the will adopted by the surrogate prevails, (which it is submitted should not,) the identical problem is raised as in the *Soher* case, which the surrogate

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[11] A line of cases beginning with Huxtum *v.* Carse, *supra,* footnote 9, held that an accumulation could not be made for a non-existent person.

[12] (1904) 178 N. Y. 442, 70 N. E. 970.

[13] (1861) 23 N. Y. 65.

[14] (1886) 41 N. Y. 66.

[15] (1597) 1 Co. 66b.

[16] (1697) 1 Salk. 224.

[17] (1916) 96 Misc. 433, 160 N. Y. Supp. 669, reversed (App. Div. 1st Dept. 1920) 183 N. Y. Supp. 550. For a discusion of this case see (1920) 20 Columbia Law Rev. 767.

accepted as binding upon him. For purposes of the present discussion the necessary facts are as follows: Leaving out of account the widow's trust there are three separate and identical trusts for each of the three daughters of the testator with remainders to the issue of each. The daughters are named as residuary legatees. The surrogate held that the statute did not apply and directed the accumulations on the trusts of the daughters who had no issue to be paid to the next of kin. It seems that here again the court failed to realize that a vested interest akin to a fee simple was given to the three daughters by the residuary clause in the will. That interest was a reversion and a reversion is always vested and those who hold it are presumptively the next eventual takers of trust estate within the meaning of the second group of cases before discussed.

If the construction of the will adopted by the Appellate Division is correct, (and it is submitted that it is,[18]) the accumulation will pass to the residuary legatees as suggested by Smith, *J.*; as the trusts established by the 12th, 13th and 14th clauses of the will have no gifts over. They were like the trust to the widow under the 8th clause of the will, the accumulation on whose trust according to the surrogate went to residuary legatees. Here the residuary legatees take because they have vested interest in the corpus of a trust estate and are presumptively the next eventual takers of it.

There is one problem that might arise in the application of the rule of the second group of cases. Suppose T by will creates a trust of all of his property for the life of A and by a residuary clause makes A residuary legatee; or suppose that there is no residuary clause, but A is sole heir and next of kin. Here the *cestui* and the reversioner are one and the same person. A can never take the corpus of the trust estate by way of enjoyment because he will be dead when the trust terminates; yet A has a vested interest in the corpus of the estate, which being vested was always alienable, devisable and descendable. It is submitted that A is the presumptive taker of the next eventual estate within the meaning of the statute.

TORT LIABILITY OF A PHYSICIAN FOR BREACH OF PROFESSIONAL CONFIDENCE.—The liability of a physician to his patient for disclosing professional secrets, and the justification for such disclosures present an interesting question on which there is little authority. In the recent Nebraska case of *Simonson* v. *Swenson* (1920) 177 N. W. 831, it was stated that a tort action will lie against a physician for stating to third parties that a patient is afflicted with "a contagious disease", but it was held that the physician is justified when such statements are made only to other patients living in the same boarding house with the plaintiff, in order to protect them from infection.

The common law does not recognize the confidential nature of the relationship of physician and patient. Information acquired by a physician in the course of his professional services may be given in evidence,[1] and there seems to be no legal duty upon the physician to preserve confidence under any circumtances. The moral duty however

[18]See (1920) 20 Columbia Law Rev. 767.

[1]Rex *v.* Gibbons (1823) 1 C. & P. 97; Banigan *v.* Banigan (1904) 26 R. I. 454, 59 Atl. 313; see People *v.* Austin (1910) 199 N. Y. 446, 93 N. E. 57; privilege of a physician not a common law right, so must be limited strictly to that created by statute. Wigmore, Evidence (1905) 3347.